

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

Z-TEL COMMUNICATIONS, INC.	}	
	}	
Complainant	}	
	}	
vs.	}	Docket No. 02-0160
	}	
ILLINOIS BELL TELEPHONE COMPANY,	}	
d/b/a AMERITECH ILLINOIS	}	
	}	
Respondent	}	

**Z-TEL COMMUNICATIONS, INC.'S  
RESPONSE BRIEF ON REHEARING WITH REGARD  
TO THE IMPOSITION OF PENALTIES**

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Z-Tel Communications, Inc., by its attorneys O’Keefe, Ashenden, Lyons and Ward, pursuant to Section 200.800 and 200.880 of the Commission’s Regulations, 83 Ill.Adm.Code Part 200.800 and 200.880, and ALJ order hereby states as follows for its Response Brief on Reopening with respect to the issue of imposing penalties against Ameritech for its multiple violations of 220 ILCS 5/13-801. Z-Tel will present its brief on the remaining issues subject to rehearing at the appropriate time.

**INTRODUCTION**

In the initial phase of this proceeding, the Commission found that Ameritech had knowingly acted in a manner that impeded competition in violation of the provisions of the Illinois Public Utilities Act. In particular, the Commission held that Ameritech unreasonably provided ZTel inferior and discriminatory access to operations support systems (“OSS”) in violation of Section 13-514(9), 13-514(11) *and* 13-801. Order at 17. The Commission further found that Ameritech acted unreasonably by impairing the

speed, quality or efficiency of services used by Z-Tel through the provisioning of untimely and inaccurate 836 Line Loss Notifications (“836 LLNs”) as prohibited by Section 13-514(2). *Id.* at 16. The Commission also held that Ameritech’s actions, or lack thereof, have had an adverse effect on the ability of Z-Tel to provide service to its customers in violation of Section 13-514(6). *Id.* The Commission noted specifically that “[g]iven that Ameritech is providing Z-Tel inferior access to its OSS, it is in violation of 13-514(9), 13-801 **and** 13-514(11) of the Act.” *Id.* at 17 (emphasis added).

With regard to implementing penalties, the Commission held that “pursuant to Sections 13-304 and 13-305 of the Act, penalties are appropriate **for Ameritech’s violation of 13-801.**” *Id.* at 24.<sup>1</sup> As such, the Commission held that a proceeding should be initiated, with the proper notice, against Ameritech to determine whether the Commission should seek the imposition of civil penalties under Sections 13-304 and 305 of the Act for failure of Ameritech to comply with Section 13-801. *Id.*

Ameritech sought rehearing on the above determination and, on June 19, 2002, the Commission voted to grant Ameritech’s Application for Rehearing with regard to the finding that penalties may be imposed under Section 13-305 for Ameritech’s violation of 13-801.

Ameritech asks this Commission to ignore the clear and unambiguous language contained in Section 13-305 and withhold the application of penalties. Z-Tel wishes that the need for discussing penalties was a moot issue. Rest assured, the Company would rather have its limited resources dedicated towards increasing its ability to compete for

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<sup>1</sup> The Commission held that imposition of Section 13-305 penalties is inappropriate for Ameritech’s multiple violations of Section 13-514 of the Act because this is the first occasion that Ameritech has been found to violate Section 13-514. Order at 23. As such, the only issue on rehearing is whether Ameritech should face penalties for its separate violation of Section 13-801.

business and residential customers in Illinois. However, as this Commission has already held, for more than a year Ameritech knowingly impeded competition and provided access to inferior and discriminatory OSS in violation of the Public Utilities Act. While Z-Tel would have preferred equal and nondiscriminatory LLNs during this period, the fact is that the Commission found Ameritech's conduct to be in violation of multiple separate provisions of the Illinois Act, including Section 13-801, and Ameritech must now accept the punishment for its unlawful actions.

In reviewing this issue, the Commission must keep in mind that it has previously found Ameritech's conduct to violate Section 13-801. Nothing in this rehearing stage can alter that conclusion. The issue, therefore, is whether the Commission will apply the clear mandates of Section 13-305 and pursue the penalty provisions required therein.

**I. THE COMMISSION HAS FOUND THAT AMERITECH VIOLATED BOTH SECTIONS 13-514 AND 13-801 (Ameritech Brief at 3-4, 8-12).**

Try as Ameritech may to blur the line between its unjustified violations of 13-801 and 13-514, it is indisputable that the Commission held that Ameritech's unlawful actions violate both of these provisions. In its Brief, Ameritech attempts to confuse the Commission into thinking that penalties for violating Section 13-801 are remedied by the terms of Section 13-516 and not Section 13-305. See, Ameritech Brief at 3. This logic belies the clear findings of the Commission in its Order.

The Commission clearly found separate and independent violations of both Section 13-514 and Section 13-801. "Ameritech has unreasonably provided Z-Tel inferior and discriminatory access to operations support systems ("OSS") in violation of 13-514(9), 13-514(11) **and** 13-801 of the Act." If the Commission were to have only

found a violation of 13-801 as a subset of Section 13-514, then the use of the conjunctive “and” would be unnecessary. Rather, it held that there were violations of both 13-514 and 13-801.

The premise that the Commission found Ameritech’s conduct to have violated Section 13-801 on an independent basis is further supported by the language in the Commission Order’s findings wherein the Commission made separate findings related to Ameritech’s conduct.

The Commission, having considered the entire record herein and being fully advised of the premises, is of the opinion and finds that:

\* \* \* \* \*

- (5) Z-Tel Communications, Inc. has shown that Ameritech Illinois’ actions are per se impediments to competition as prohibited by Section 13-514(2), (6), (9), (11) of the Public Utilities Act;
- (6) Z-Tel Communications, Inc. has shown that Ameritech Illinois’ actions violate Section 13-801 of the Public Utilities Act;

\* \* \* \* \*

Order, p. 26. Thus, it is clear that the unlawful actions of Ameritech were found to violate Section 13-801 separate and aside from its violations of Section 13-514. The question now is what power the Commission has to impose Section 13-305 penalties for this violation of Section 13-801.

**A. As a violation of Section 13-801, the Commission has no option but to pursue a penalty proceeding under the General Assembly’s mandate in Section 13-305.**

The syllogism is very simple:

- 1. Section 13-801 is a provision of the Illinois Public Utilities Act;
- 2. Ameritech has violated the terms of Section 13-801, as this Commission has already held;
- 3. As a violation of the Act, Section 13-305 mandates that the Commission must pursue its investigation to determine if penalties are appropriate; and,
- 4. The Commission is correct to pursue its obligations imposed upon it by the General Assembly and initiate its penalty proceeding.

Section 13-305 reads as follows:

A telecommunications carrier . . . that violates or fails to comply with **any provisions of this Act** or that fails to obey, observe, or comply with any order . . . of the Commission, made or issued under authority of this Act, in a case in which a civil penalty is not otherwise provided for in this Act, but excepting Section 5-202 of the Act [220 ILCS 5/5-202], **shall** be subject to a civil penalty imposed in the manner provided in Section 13-304 [220 ILCS 5/13-304] . . . for each offense unless the violator has fewer than 35,000 subscriber access lines, in which case the civil penalty may not exceed \$ 2,000 for each offense.

\* \* \* \* \*

Every violation of the provisions of this Act or of any order, decision, rule, regulation, direction, or requirement of the Commission, or any part or provision thereof, by any corporation or person, is a separate and distinct offense. Penalties under this Section **shall** attach and begin to accrue from the day after written notice is delivered to such party or parties that they are in violation of or have failed to comply with this Act or an order, decision, rule, regulation, direction, or requirement of the Commission, or part or provision thereof. In case of a continuing violation, each day's continuance thereof **shall** be a separate and distinct offense.

\* \* \* \* \*

220 ILCS 5/13-801 [emphasis added.]

Section 13-305 is clear and unambiguous. Because of the Commission's finding that Ameritech violated § 13-801, the Commission has no option but to pursue penalties as required by the General Assembly.

When construing a statute, the Commission's primary objective is to ascertain and give effect to the legislature's intent. *Boaden v. Department of Law Enforcement*, 171 Ill.2d 230, 664 N.E.2d 61 (1996). The best means of determining legislative intent is through the statutory language. *In re Application of the County Collector of DuPage County for Judgment for Delinquent Taxes for the Year 1992*, 181 Ill.2d 237, 244, 692 N.E.2d 264 (1998). The Commission must begin with the language of the statute, which must be given its plain and ordinary meaning. *Davis v. Toshiba Machine Co.*, 186 Ill.2d

181, 184, 710 N.E.2d 399 (1999). Where the language is clear and unambiguous, the Commission must apply the statute without resort to further aids of statutory construction. *Davis*, 186 Ill.2d at 185. One of the fundamental principles of statutory construction is to view all provisions of an enactment as a whole. *Michigan Avenue National Bank v. County of Cook*, 191 Ill.2d 493, 504, 732 N.E.2d 528 (2000). Words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute.

In light of the foregoing, an examination of Section 13-305 and the Commission's Order clearly demonstrates that both are clear and unambiguous. As a violation of Section 13-801, Ameritech has violated a provision of the Act and "shall be subject to a civil penalty imposed in the manner provided in Section 13-304." 220 ILCS 5/13-801. Penalties under Section 13-305 "shall attach and begin to accrue from the day after written notice is delivered to such party or parties that they are in violation of or have failed to comply with this Act." *Id.*

The bottom line is that the Commission has no choice but to uphold its prior determination and pursue penalties. Illinois courts have long held that the use the word "shall" is a clear expression of legislative intent to impose a mandatory obligation. See, e.g., *Village of Winfield v. Illinois State Labor Relations Board*, 176 Ill.2d 54, 64, 223 Ill.Dec. 33, 678 N.E.2d 1041 (1997); *People v. Thomas*, 171 Ill.2d 207, 222, 664 N.E.2d 76 (1996) (the use of the word "shall" expressed a clear legislative intent to make Class X sentencing mandatory for certain repeat offenders).

The General Assembly, in drafting Section 13-305, expressly used the word "shall" when ordering the Commission to impose penalties for violations of the Act. The

General Assembly clearly intended to impose a mandatory obligation. *Winfield*, 176 Ill.2d at 64. For this reason, the Commission held that penalties are required for Ameritech's violation of Section 13-801. Order at 23. The Commission was doing nothing more than adhering to its obligations as mandated by the General Assembly.

Section 13-305, on its face, requires the Commission to impose penalties against any carrier "that violates or fails to comply with *any provision of this Act*. . ." Section 13-305 does not exempt from this requirement Section 13-801, as argued by Ameritech. Reading an exemption where clearly none exist goes beyond the clear and unambiguous language of Section 13-305 and is improper as a matter of statutory interpretation. *Davis*, 186 Ill.2d at 185.

**B. Ameritech's arguments that the record evidence does not support the imposition of penalties should be properly addressed in the penalty proceeding, not on rehearing. (Ameritech Brief at 8-12)**

Ameritech inappropriately raises defenses against imposing penalties in its Brief and argues that the imposition of penalties should be mitigated or rejected altogether as a result of these defenses. See, Ameritech Brief, at 8-12. To be clear, Z-Tel disagrees with just about every assertion raised by Ameritech. However, ZTel believes it is more appropriate to address the merits of the claims the appropriate time – i.e., the penalty proceeding – rather than on rehearing where the issue is whether the Commission should reverse its previous decision regarding the imposition of penalties. At that time, the Commission can make a determination as to what penalties, if any, it will apply to Ameritech for its proven violations of the Act. The Commission can also then take into consideration these mitigating circumstances and defenses that Ameritech has proffered in its Brief.



Z-Tel, however, cannot stay silent while Ameritech asserts that its violations of Section 13-801 were innocent omissions. In the interest of presenting a counter to some of the wild allegations and defenses made by Ameritech, however, Z-Tel feels compelled to set the matter straight. As such, it will attempt to briefly refresh the Commission's memory as to why we are here in the first place.

Ameritech boldly claims that on rehearing the Commission should find that the imposition of penalties is not warranted because:

- Ameritech “has acted in good faith to comply with the law” (Ameritech Brief at 8);

No matter how much Ameritech claims it acted in “good faith”, the bottom line is that the Commission has found it to have violated Sections 13-514 and 13-801. The record before this Commission is ripe with evidence demonstrating the difficulties faced by Z-Tel in attempting to have Ameritech address its LLN problems. After *more than one year* of Z-Tel registering complaints with Ameritech that the 836 LLN process was defective and was causing considerable harm to Z-Tel's ability to serve customers (Z-Tel witness Reith Direct Testimony, at 8-9), Ameritech finally conceded that the 836 LLN process has been defective since Z-Tel first began receiving the notices in December 2000. (Ameritech Exh. 1.F.)

Further, throughout the initial phase of this proceeding, Ameritech attempted to convince the Commission that it acted reasonably to fix the problem so as not to have violated the Act. See, i.e., Ameritech Initial Brief at 2-4, 27-28. The Commission saw through Ameritech's arguments. “It is evident, though, that multiple problems have been identified for more than a year and Z-Tel has shown that not only does Ameritech provide itself with different and arguable better enhanced LLN, but that this enhanced LLN has given Ameritech a competitive marketing advantage.” Order at 17.

- “the violations of the Act were not intentionally committed” (Ameritech Brief at 8);

As the Commission already held, “We do not agree that a showing of intent to impede competition is required.” Order at 15. It is not relevant whether the violations were intentional or not. The Commission did find, however, that the conduct of Ameritech was a per se impediment to competition. As such, Ameritech “knowingly” violated the Act. Order at 15-18.

- The line disconnect data provided to Ameritech's retail and Winback groups was "not inherently superior to the 836 LLN" provided Z-Tel (Ameritech Brief at 9);

This claim is absolutely at odds with the Commission's findings in the Order. In point of fact, the Commission specifically held that the additional data items provided Ameritech's retail operations upon the loss of an Ameritech customer (and that were not provided to Z-Tel) lead to "inferior" provisioning to Z-Tel and "discriminatory access" for Ameritech in violation of Section 13-801. Order at 16. Any claim by Ameritech now that its systems were not superior to those provided Z-Tel is absolutely false and counter to the Commission's previous conclusion that "the 836 LLN that Z-Tel receives from Ameritech contains less information than the enhanced LLN provided to Ameritech's Winback personnel." Order at 17.

- "The Local Loss Report [provided to Ameritech's retail groups] could only be considered superior only so long as there were significant defects in the 836 LLN process" (Ameritech Brief at 9)

Again, this claim is in direct conflict with the previous findings of the Commission. The entire basis of the Commission's findings in its Order is that Ameritech provided itself with superior line disconnect data **and** that the 836 LLN as provided to Z-Tel was inaccurate and untimely. In short, the Commission held that the 836 LLN was defective, and that Ameritech discriminated against Z-Tel because it provided its retail operations a Local Loss Report that was far superior to the data provided Z-Tel.

- "Ameritech voluntarily informed the industry of the full extent of the issues at a conference on March 13-14, 2002" (Ameritech Brief at 9-10).

The record demonstrates that Z-Tel initially contacted Ameritech about the problems it was having with the 836 LLN in December of 2000. After **more than a year** of being forced to use a defective and inferior 836 LLN, Z-Tel was forced to file this complaint and seek the assistance of the Commission. Only then did Ameritech magnanimously inform the industry of the issue. This Commission cannot forget that it has already found that Ameritech acted unlawfully and in violation of the Act. This assertion was raised in Ameritech's Initial Brief (pages 2-3, 11-12). Yet, the Commission still held against Ameritech. Z-Tel sees no reason why Ameritech's 15 months worth of delays should serve as grounds for not pursuing penalties for actions the Commission has already found to violate Section 13-801.

and, most boldly,

- Ameritech's retail operations currently "receive the exact same LLNs under the exact same 836 LLN process as Z-Tel" (Ameritech Brief at 11).

Within days of filing this Brief, Z-Tel will be appearing before the ALJ for evidentiary hearings during the rehearing phase of this proceeding. At that time, Z-Tel and Staff will present evidence demonstrating that Ameritech's retail operations currently receive line disconnect data that is not provided to Z-Tel. For Ameritech to cite to issues it knows are subject to upcoming hearings and argue that penalties are inappropriate based upon a disputed issue is the height of impropriety.

**II. THE COMMISSION IS EMPOWERED WITH THE ABILITY TO IMPOSE PENALTIES FOR AMERITECH'S VIOLATIONS OF SECTION 13-801 FOUND BY THE COMMISSION (Ameritech Brief, at 5-8).**

Ameritech argues that penalties cannot be applied under Section 13-305 for its violations of Section 13-801 for the period prior to the May 8, 2002 Order because, according to Ameritech, it had no prior notice of an alleged Section 13-801 violation. See, Ameritech Brief at 5, 8. According to Ameritech, the only notice that it has received of its violations that would subject it to a penalty is the Commission's May 8, 2002 Final Order in this proceeding. Ameritech Brief at 5. Thus, under this argument, Ameritech does not argue that it cannot face penalties, it just believes that the penalties cannot predate the Order, the purported first time it was put on notice of an alleged Section 13-801 violation. Said another way, Ameritech admits, at the very least, that it received notice of the possibility of facing Section 13-305 penalties on May 8, 2002. Ameritech Brief at 5, 8.

As explained below, these arguments are attempts to mitigate the possible size of any penalty and are more appropriately raised in the penalty proceeding. Further, Ameritech was provided notice of the 13-305 penalty possibilities when Z-Tel filed its complaint on February 25, 2002, or, at the very latest, when the Commission entered its Emergency Order on February 27, 2002.

**A. Ameritech's seeks to mitigate penalties by arguing the manner in which notice is provided or when penalties start to accrue.**

All of Ameritech's arguments in this section pertain to the manner in which penalties should accrue, possible mitigations and defenses, and how the Commission should provide notice to the company. These arguments are inappropriate at this rehearing stage and are better raised as possible defenses in the upcoming penalty proceeding itself.

Ameritech goes to great length to argue that the legislative history of this proceeding requires any possible notice of Section 13-305 penalties to stem from the Commission and, after hearing, the Commission could impose penalties from the date of delivery of the notice rather than the date of the Order. According to Ameritech, since the May 8, 2002 Order was the first notice of a possible violation of Section 13-801, penalties may not be imposed for conduct prior to that time.

While these arguments may make for fascinating reading, the bottom line is that they are all based around the manner in which penalties accrue and notice is provided. These issues are not relevant to whether the Commission should upset its earlier determination that penalties are appropriate for Ameritech's multiple violations of Section 13-801 of the Act. In short, these arguments are best served as lines of defense in the next proceeding.

**B. Under Illinois law, notice is deemed given upon the filing of the underlying complaint.**

Ameritech admits that, at the very least, it has received notice of a possible Section 13-305 penalty upon the entering of the Order on May 8, 2002. Ameritech Brief at 5, 8. Under Illinois law, however, for purposes of due process requirements, notice of

a potential violation of the law is deemed given upon the filing of the underlying complaint. In other words, because Z-Tel's Complaint served upon Ameritech contained notice of both a possible violation of Section 13-801 and specifically requested imposition of penalties as a prayer for relief, Ameritech was put on notice that it faced possible penalties and should prepare its defense accordingly. The notice required by Section 13-801 was met when Z-Tel filed its complaint with the Commission.

Illinois Courts have long recognized that a party must not only receive notice of the charges against him, but be afforded the opportunity to be heard on such charges. *Durkin v. Hey*, 376 Ill. 292 (1941); *Bruce v. Department of Registration and Education*, 26 Ill.2d 612 (1963); *People v. Peters*, 10 Ill.2d 577, 580 (1957). Notice to the alleged violator is a fundamental element of due process. *Id.* Charges in an administrative proceeding need not be drawn with the same refinements as pleadings in a court of law, but the charges must be sufficiently clear and specific to allow preparation of a defense. *Greco v. State Police Merit Board*, 105 Ill.App.2d 186, 245 N.E.2d 99.

Section 13-305 describes in clear and unambiguous terms that "Penalties under this Section ***shall*** attach and begin to accrue from the day after ***written notice is delivered to such party*** or parties that they are in violation of or have failed to comply with this Act . . ." 220 ILCS 5/13-305. Because the statute is clear as to when penalties begin to accrue, the Commission must apply the terms without resort to further aids of statutory construction. *Michigan Avenue National Bank*, 191 Ill.2d at 504. Thus, an analysis is required as to the appropriate manner in Illinois that notice is deemed given.

In Illinois, the complaint and summons once served upon a defendant provide sufficient notice to satisfy constitutional due process requirements. "Obviously, the

complaint and summons once served upon the [Defendant] would have provided sufficient notice to satisfy constitutional due process requirements.” *City of Marseilles v.*

*Union Bank*, 713 Ill.App.2d 931; 741 N.E.2d 333, 336 (2000).

the [Plaintiff] met its statutory notice obligation by notifying the Bank that it would be filing suit. [The Plaintiff] met its constitutional due process obligation by serving a summons and complaint upon the Bank, which notified the Bank of the pendency of an action and afforded it an opportunity to object to proposed infringement upon its property rights. Nothing more needed to be done to satisfy due process requirements of the Illinois and United States constitutions.

*Id.*

It is undisputed that Z-Tel provided Ameritech with proper service of its Complaint, including the allegation that Ameritech was violating Section 13-801, and that Ameritech was provided an opportunity to object to the claims contained therein. It is also undisputed that Z-Tel’s Complaint sought as a remedy to “Impose a penalty of up to \$30,000 or 0.00825% of Ameritech’s gross intrastate annual telecommunications revenue, whichever is greater, for each violation of the Illinois Public Utilities Act.” See, e.g., Amended Complaint, Count I Prayer for Relief, ¶ L; Count III Prayer for Relief, ¶ F. This language is taken almost verbatim from Section 13-305 wherein penalties for violations of the Act are required.

Ameritech presented a stiff and aggressive legal defense of its actions, including devoting large sections of its briefs denying the allegations that it had violated Section 13-801 of the Act. Clearly, by ZTel serving the Complaint, Ameritech was on notice that it faced a possible finding that it had violated Section 13-801 and that it faced penalties under Sections 13-304 and 305 as a form of remedy. Under Illinois law, “nothing more needed to be done to satisfy due process requirements of the Illinois and United States constitutions.” *Marseilles*, 741 N.E.2d at 336. In short, Ameritech was

provided notice that it faced a possible Section 13-801 violation and Section 13-305 penalties, it was presented an opportunity to defend itself and be heard on such charges.

*Peters*, 10 Ill.2d at 580.

**C. Assuming, *arguendo*, the Commission accepts Ameritech's argument that legislative intent mandates the notice come from the Commission, the Commission provided such notice when it entered its Emergency Order on February 27, 2002.**

Finally, assuming, *arguendo*, the Commission accepts Ameritech's argument that the legislative intent requires that notice must come from the Commission; such notice was provided, at the very latest, upon the Commission's entering of the Emergency Order on February 27, 2002.

At a minimum, due process requires that a deprivation of property cannot occur "without providing notice and an opportunity for a hearing appropriate to the nature of the case." *Wilson v. Bishop*, 82 Ill.2d 364, 369, 45 Ill.Dec. 171, 412 N.E.2d 522 (1980). Notice is constitutional where it will "apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*, quoting, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S.Ct. 652 (1950).

An elementary and fundamental requirement of due process in any proceeding that is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane*, 339 U.S. at 314; Citing, *Milliken v. Meyer*, 311 U.S. 457; *Grannis v. Ordean*, 234 U.S. 385; *Priest v. Las Vegas*, 232 U.S. 604; *Roller v. Holly*, 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information (*Grannis*, 234 U.S. 385), and it must afford a reasonable time for

those interested to make their appearance. *Roller*, 176 U.S. 398, *Goodrich v. Ferris*, 214 U.S. 71. But, if with due regard for the practicalities and peculiarities of the case, these conditions are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." *American Land Co. v. Zeiss*, 219 U.S. 47, 67; and see *Blinn v. Nelson*, 222 U.S. 1, 7.

It is undisputed that Z-Tel's Complaint and Request for Emergency Relief specifically alleged that Ameritech's failure to provide accurate and discriminatory 836 LLNs was a violation of Section 13-801 and that Z-Tel sought penalties under Section 13-305. On February 27, 2002, the Commission entered its Emergency Order wherein it granted Z-Tel's request for emergency relief and held, inter alia, that:

(4) Z-Tel has shown a likelihood of success on the merits of its Complaint, that it would suffer irreparable harm in the absence of emergency relief and that granting its request for emergency relief pursuant to Section 13-515(e) is in the public interest;

Emergency Order at 8. Upon the issuance of this Emergency Order, the Commission provided Ameritech with notice "of the pendency of the action" and afforded Ameritech with "an opportunity to present their objections" that Section 13-801 was violated and that penalties were inappropriate. *Mullane*, 339 U.S. at 314.

Further, even under Ameritech's interpretation of the legislative intent, it is clear that, at the latest, the Commission provided Ameritech with notice of an alleged violation when it issued its Emergency Order. Ameritech relies upon the transcript of the House of Representative's deliberations to demonstrate its contention that the Commission's Order provides notice of a violation of the Act. In point of fact, the legislative history relied upon by Ameritech specifically holds that it is *not* the intent of the General Assembly to



delay the notice requirement until after the underlying order has been issued. Rather, according to Representative Hamos, in language cited by Ameritech, “penalties begin to accrue one day after a carrier receives written notice from the ICC of an *alleged* violation.” State of Illinois, 92<sup>nd</sup> General Assembly, House of Representatives, Transcription Debate, May 31, 2001, pp. 32-33. Notice need not wait until a violation has been proven. While Z-Tel contends that the notice requirement was satisfied as a result of service of its Complaint, at the very latest, Ameritech received notice of an “alleged violation” of the act and request for penalties when the Commission issued its Emergency Order finding that Z-Tel was likely to succeed on the merits of its allegations.

Z-Tel will say again, these arguments are all best made at the appropriate time, the penalty proceeding. At that time, Ameritech can raise these mitigations and defenses. The arguments certainly do not serve as a foundation for reversing the Commission’s previous determination that Ameritech should be subject to penalties for its violations of Section 13-801.

## **CONCLUSION**

In reviewing this matter, the Commission must keep in mind that the question of whether Ameritech has violated Section 13-801 is not subject to review in this rehearing. Ameritech has violated Section 13-801. The issue, then, is whether the Commission will comply with the mandates of the Act and begin its penalty proceeding.

Ameritech has presented no legal or policy grounds to serve as a basis for the Commission to take the unparalleled step of reversing its earlier determination. Most of Ameritech’s arguments raised on rehearing are more appropriately raised as defenses or mitigating circumstances at the penalty proceeding. Further, Ameritech asks the

Commission to ignore a clear and unambiguous requirement to impose penalties for violations of any section of the Act. It is without question that Ameritech has violated Section 13-801 as that issue cannot be relitigated on rehearing. It is without question that Z-Tel sought Section 13-305 penalties as a remedy for the Section 13-801 violations in its Complaint. The Commission must now follow through with its obligations under the Act.

WHEREFORE, for each of the foregoing reasons, Z-Tel respectfully requests that the Commission uphold its prior findings of fact and proceed with its previous determination that it should initiate a proceeding against Ameritech to determine whether the Commission should seek the imposition of civil penalties under Section 13-304 and 13-305 of the Act for Ameritech's failure to comply with Section 13-801 of the Act.

Respectfully submitted,

Z-TEL COMMUNICATIONS, INC.



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